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Noel Canning, a division of the Noel Corporation and Teamsters Local 760. Case 19–CA–145344

July 14, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

On January 28, 2016, Administrative Law Judge Ariel L. Sotolongo issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Noel Canning, A Div. of the Noel Corporation, Yakima, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

“(b) Within 14 days after service by the Region, post at its Yakima, Washington facility copies of the attached

¹ The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, the Respondent contends that the judge’s rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge’s decision and the entire record, we are satisfied that the Respondent’s contentions are without merit.

The judge discussed the Board’s Order in *Noel Canning*, 361 NLRB No. 129 (2014), which reaffirmed and incorporated by reference the Board’s Decision and Order in 358 NLRB 16 (2012), in light of the Supreme Court’s decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). We note that recently the United States Court of Appeals for the District of Columbia Circuit enforced the Board’s 2014 Order. See *Noel Canning v. NLRB*, ___ F.3d ___ (D.C. Cir. 2016).

² We shall modify the judge’s recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997), to reflect the date the Respondent unlawfully denied access to the Charging Party’s representatives.

notice marked “Appendix.”³ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 27, 2015.”

Dated, Washington, D.C. July 14, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Patrick E. Berzai, Sr., Esq., for the General Counsel.

Gary E. Lofland, Esq. (Meyer Fluegge & Tenney, PS), for the Respondent.

DECISION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. I presided over this case in Yakima, Washington, on October 13, 2015, pursuant to a complaint issued by the Regional Director for Region 19 of the National Labor Relations Board (the Board) on July 13, 2015. The complaint alleges that Noel Canning, a Division of the Noel Corporation (Respondent or the Employer), violated Section 8(a)(5) and (1) and 8(d) of the Act by denying access to its facility in Yakima to a business representative of Teamsters Local 760 (Union), with whom Re-

³ If this Order is enforced by a Judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

spondent has a collective-bargaining relationship. As discussed below, the collective-bargaining history of the parties, as well as the legal background to the present case, are important in understanding the current dispute and placing it in its proper context.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it is a Washington corporation with an office and place of business in Yakima, Washington, where it is engaged in bottling and distributing Pepsi-Cola products. In conducting its business operations in the previous 12-month period as of July 2015, a representative period, Respondent derived gross revenues in excess of \$500,000. During the same time period, Respondent purchased and received at its Yakima facility goods valued in excess of \$50,000 directly from points outside the State of Washington.

Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE(S)

A. Background Facts

The background in this case is key to understanding the current controversy and, except as discussed below, is not in dispute. Respondent and the Union have had a collective-bargaining relationship for a number of years, with the Union representing certain of Respondent's employees.¹ The last undisputed collective-bargaining agreement between the parties was in effect from May 1, 2007, to April 30, 2010. The parties engaged in collective-bargaining negotiations for a new contract from June to December 2010, and these negotiations—and their result—is the subject of a dispute described below.

On September 26, 2011, Administrative Law Judge Gerald A. Wacknov issued a decision finding that on December 8, 2010, Respondent and the Union, during the course of negotiations, reached a verbal agreement regarding the substantive terms of a new collective-bargaining agreement (the Agreement). The judge also concluded that by refusing to execute the agreement, which was ratified by a vote of the unit employees on December 15, 2010, Respondent violated Section 8(a) (5) and (1).² On February 8, 2012, the Board affirmed Judge Wacknov's decision. Thereafter, in January 2013, the United States Court of Appeals for the District of Columbia vacated the Board's order, on the grounds that at the time the Board

included three persons whose appointments were constitutionally invalid, and therefore the Board lacked a proper quorum to issue its decision and order. In June 2014, the Supreme Court issued its now seminal decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), which for the first time defined and set parameters on the President's constitutional authority to make recess appointments. The Court found that the President's January 2012 recess appointments to the Board were invalid, affirming the court of appeals' judgment vacating the Board decision, on modified grounds.

On December 16, 2014, the Board took up the matter again and affirmed Judge Wacknov's decision, finding that Respondent had violated the Act by refusing to execute the Agreement, ordering Respondent to execute the Agreement and abide by its terms, including the payment of a retroactive bonus to employees. *Noel Canning*, 361 NLRB No. 129 (2014).³ Article 10.6 of the agreement (the access clause), which was also contained in the prior 2007–2010 agreement, states:

Authorized agents of the Union shall have access to [Respondent's] establishment during working hours for the purposes of adjusting disputes, investigating working conditions, and ascertaining that the agreement is being adhered to, provided, however, that there is no undue interruption of [Respondent's] working schedule.

It is the application of the above access clause, which includes the past practice of the parties, which is the subject of the current dispute, as discussed below.

B. The Current Dispute

The current dispute centers on events that occurred in January, 2015.⁴ Union Business Representative Robert Koerner testified that he has been served in that capacity since 2003, and is assigned to represent Respondent's employees. He testified that in carrying out his duties as business representative, he visited Respondent's bottling plant (the "plant" or "facility") on average about 7–10 times per year since 2003. Sometimes his visits were simply to post a union notice in the employee break (or lunch) room, and involved little or no interaction with the unit employees. Other times would he would meet with employees, including shop stewards Eddie Ford or Mark Weber, to discuss grievances or work assignments. Koerner testified that

³ The Board's decision is currently pending review by the U.S. Court of Appeals for the District of Columbia. There is no dispute that the 2014 Board that issued the latest decision in this matter was properly appointed, although Respondent contends in its appeal, *inter alia*, that the Board lacked jurisdiction because at the time of its decision the case had not been remanded by the court of appeals.

⁴ All dates shall be in 2015, unless otherwise indicated. Henceforth, transcript pages will be referred to as "Tr." followed by the p. number(s). General Counsel's exhibits will be referred to as "GC Exh.," Respondent's exhibits will be referred to as "R. Exh." I note the transcript, although generally accurate, contains a number of errors, which will be corrected as follows: p. 28, L. 2, "shelf" should be "shop; p. 32, L. 8 "noticed" should be "notices;" p. 39, L. 5, "adopt" should be "don't;" p. 40, L. 16, "in her" should be "not;" p. 60, L. 14, "record" should be "records." There may be other errors, but these are the most salient.

¹ The Union represents the following employees of Respondent: All production employees, including lead production, dock/warehouse employees, including lead dock/warehouse, quality control mixer, maintenance employees, mechanics, construction worker employees, utility employees; excluding all other employees, guards, office clerical employees, owners and supervisors as defined in the Act.

² The agreement, according to the agreed-upon terms found by the judge to have occurred, was to be effective from October 1, 2010, to September 30, 2012. The judge also found that Respondent violated the Act by reneging on its agreement to pay a retroactive bonus to employees.

the procedure for his visits was always the same, and never required prior notice. He would simply show up at the gate to the plant, announce (through an intercom system) that he was there for an official union visit, and was granted access through the gate to the parking lot. He would then proceed to the reception area of the plant, and the receptionist would then give him a hair net to wear inside the plant, and allow him to go into the plant to conduct his business. On those occasions when the receptionist was not present, Koerner would go into Plant Manager Sam Brackney's office, which was adjacent to reception area, and Brackney (or his predecessor, Jerry Aucutt) would allow him in. Koerner identified several notices that he personally posted at Respondent's break room on different times using this procedure, which were introduced into evidence (GC Exhs. 5; 6; 7; and 8; Tr. 17–18; 23–30; 32–38; 42–43).

On January 27, Koerner asked his fellow business representative, Carl Keller, to accompany him on a visit to Respondent's facility. Koerner testified that he and Keller first visited the "corporate" or administrative office, which is located directly across the street from the plant. At the corporate office, Koerner dropped off copies of the agreement, which the Board had ordered Respondent to execute in its December 2014 decision, described above. They then went across the street to the plant, and announced at the gate that they were there for a visit, and were granted access into the parking lot. Koerner testified that he and Keller then went to the reception office in the plant and informed the receptionist that they were there to post a notice in the employee break room. Rather than granting them access to the plant as in the past, the receptionist had them wait, and went to inform Brackney. When Brackney came out to the reception area, he informed Koerner (in Keller's presence) that he was not allowed in the plant (or the premises), that if he wanted something posted, the shop steward would have to do so.

When Koerner asked why, Brackney responded that he was only doing his job. Koerner then said that he would be filing charges, and he and Keller then left. (Tr. 37–38; 40.)⁵

Keller corroborated Koerner's testimony about the events of January 27, including their visit to both the "corporate" office as well as the plant's reception area, and of their encounter with Brackney, who denied Koerner access to post the notice. Indeed, the only difference in their accounts of the events is that in Keller's version, when Koerner asked Brackney why he was denying him access, Brackney replied that he was just doing

what he was told to do—as opposed to saying that he was just doing his job. (Tr. 56–60.)

Eddie Ford testified that he has been an employee of Respondent at the plant for 26 years, and a union shop steward for about 10 years. He testified that he has observed Koerner visiting inside the plant a few times a year, sometimes just posting a notice in the break room, and other times speaking to employees. He has actually observed Koerner post union notices at the bulletin board at the employee break room inside the plant. He testified that he was not aware that Koerner had been denied access to enter the plant on January 27. (Tr. 62–64; 70.)

Sam Brackney, Respondent's plant manager, testified that he has served in that capacity for about 9 years. Regarding the events of January 27, Brackney admitted denying Koerner access to the plant to post a notice, and telling Koerner that it was up to the shop steward—whom he identified as Mark Weber—to post the notice.⁶ He did not remember if someone was accompanying Koerner on that day. Brackney's explanation for his denial of access to Koerner on that day contradicts not only Koerner's testimony, but Union Shop Steward Ford's as well. As long as he had been manager, according to Brackney, Koerner had *never* been allowed access to the plant to post notices, which were instead posted by the shop steward. Brackney admitted never actually having seen the shop steward—either Weber or Ford—posting a notice, but since Weber arrived at the plant earlier than he did, he assumed that Weber had posted the notices before he arrived. He admitted that the contract allowed union agents access if the matter pertained to the "contract," but testified that he did not recall ever seeing Koerner inside the plant to handle grievances or for any other reason, adding that there hadn't been any grievances since he (Brackney) had been there.⁷ He also asserted that there was no way for Koerner to have visited the plant without his knowledge, because he would have been told had Koerner visited. (Tr. 74–76; 78–81; 85–90.)

As implied above, the testimony of Brackney cannot be reconciled with that of Koerner or Ford, because he contradicts them. I credit the testimony of Koerner, and conclude that the practice prior to January 2015 was that he would routinely be allowed access into Respondent's plant to post notices or to meet with employees for matters relating to the collective-bargaining agreement. I credit Koerner's testimony—and discredit Brackney—for the following reasons. First, Koerner testified that he had personally posted several notices, which were introduced as evidence, at the employee break room at Respondent's plant—a room that he described in detail, as he did other parts of the plant. Such familiarity with the layout of

⁵ Koerner never showed Brackney the actual notice he wanted to post. Koerner initially incorrectly identified a notice introduced as GC Exh. 4 as the one he had intended to post on that day, but later corrected his testimony to indicate that the notice introduced as GC Exh. 9 was the one he had intended to post on that day. GC Exh. 9 was marked as an exhibit (Tr. 97) and discussed by Koerner in his testimony, but apparently the General Counsel inadvertently failed to offer it into evidence, so it was not admitted into the record. I admit GC Exh. 9 into the record now, since this evidence was duly considered and Respondent cross-examined Koerner about its contents. Moreover, in the final analysis, the actual contents of the notice are of little relevance, since the basis of Respondent's refusal to grant Koerner access on January 27 had nothing to do with the contents of the intended notice, which was never shown to Brackney.

⁶ Brackney testified that Eddie Ford had been steward "until a few years ago," but then added that Ford and Weber "have a shared duty" (as stewards), although it was Weber who took care of things (Tr. 77; 84). I note that in his September 2011 decision, Judge Wacknov indicated that Ford was the steward at the time, and that Weber had substituted for him at the December 8, 2010 bargaining session because of an injury that Ford had sustained.

⁷ Koerner testified that during his time as business representative, a couple of grievances have been filed by Respondent's employees, the last one in 2008, but that no grievance had reached arbitration (Tr. 51–52).

the plant would not be likely from a person who had rarely—if ever, if Brackney were to be believed—visited the plant. Secondly, Ford testified that he had seen Koerner inside the plant on numerous occasions, either posting notices or meeting with employees, thus corroborating Koerner’s testimony. Brackney, on the other hand, had never actually seen the notices being posted, and assumed they had been posted by the shop steward. Moreover, I find it highly implausible, under the circumstances, that a business agent of this Union—or any union in similar circumstances, for that matter—would not ever visit one of his shops (as implied by Brackney), during a period of 10–12 years. Finally, although it is true that the contractual access clause, as further discussed below, does not include or mention the posting of notices as one of the reasons for allowing access, it is reasonable to infer that such access would have been routinely granted. In this regard I note that the posting of a notice could be accomplished quickly and would not typically require any contact between the business agent and unit employees, thus minimizing any chances of interruption or disruption of work—which the language of the access clause emphasizes as a goal.

Accordingly, and for these reasons, I credit the testimony of Koerner and Ford, and conclude that prior to January 27, 2015, the past practice of the parties was to allow the Union’s representative, Koerner, access to the plant to post notices—as well as to meet with employees.⁸

C. Discussion and Analysis

This case presents several issues. First; Did Respondent unilaterally change the contract regarding the Union’s right to gain access to the plant, as alleged by the General Counsel in its complaint and posthearing brief? Second, even if Respondent did not change the contract, did Respondent unilaterally change past practice as to how the access clause was construed and implemented by the parties? Third, assuming past practice was unilaterally changed was the change material, substantial, or significant or was such change de minimis? Finally, assuming that the answer is yes, was such violation properly alleged or implied by the pleadings, thus giving Respondent due process opportunity to fully litigate the issue?

First, with regard to the allegation that Respondent unilaterally changed the contract, the General Counsel argues in its brief that Respondent derogated the agreement by denying the Union Business Agent (Koerner) access to post a notice on January 27. The General Counsel further avers in its brief that the access clause in essence granted the Union unfettered access to the plant, since the access clause allowed it to check if “the Agreement is being adhered to.” I disagree. A plain reading of the access clause reveals that access is allowed “for the

purposes of adjusting disputes, investigating working conditions, and ascertaining that the agreement is being adhered to . . . ” (emphasis supplied), which clearly sets some limitations on the reasons for allowing access. Koerner admittedly did not request access on January 27 for any of the above-described purposes, but rather requested access to post a notice (GC Exh. 9). This notice simply announced a union meeting regarding contract proposals (and a barbeque), a purpose that cannot be reasonably construed to fall within the specified purposes listed in the access clause. There is simply no evidence that Koerner wanted access for the reasons specified in the access clause, nor that he had any reasonable belief, for example, that the contract was not being adhered to. Further, Respondent did not completely refuse the Union the chance to post the notice (and therefore the right to communicate with its members), but rather insisted that it should be done by the shop steward—not the agent by giving him access. Accordingly, I conclude that Respondent did not “abrogate” or modify the contract—at least not the *letter* of the contract.⁹

Whether Respondent abrogated the *spirit* of the contract, as reflected by the parties’ past practice, is another matter altogether, which brings us to the second issue posed above. Based on the credited testimony of Koerner and Ford, I concluded that Respondent routinely granted access to Koerner into its plant to post union notices, as well as meeting with employees, and that such access was granted in an informal manner without need for prior notice. Accordingly, I conclude that regardless of actual language of the access clause, this practice had become the established *modus operandi* of the parties. It is well established that employers cannot unilaterally change the terms and conditions of employment when its employees are represented by a union, whether such terms and conditions are explicitly spelled out in a collective-bargaining agreement or exist by virtue of an established past practice, when such change is material, substantial and significant. The Board has found employers who have unilaterally changed their policy regarding permitting access to union representatives have violated Section 8(a)(5) and (1) of the Act, since such access is a mandatory subject of bargaining. *Fred Meyers Stores, Inc.*, 362 NLRB No. 82 (2015); *Turtle Bay Resorts*, 355 NLRB 706 (2010); *Ernst Home Centers, Inc.*, 308 NLRB 848, 848–849 (1992).

Respondent avers that even if the past practice was changed, such change was not material, substantial, or significant. I disagree. First, I note that the Board has found such change to be significant and material in similar situations, because it tends to interfere with a representative’s ability to represent employ-

⁸ Koerner also testified that in July, after being initially refused to post another notice by another management official (Bill Dalton), he pleaded with Brackney to let him post the notice (GC Exh. 4) because the International Union required the posting, which dealt with the election of International union officers. Brackney allowed the posting at the time, even though Brackney confessed that this might get him “in trouble.” (Tr. 99–100.) In my view this allowed posting did not represent a return to the past practice, but rather consisted of a one-time isolated event.

⁹ The General Counsel cites *Frontier Hotel & Casino*, 309 NLRB 761 (1992), *enfd. sub nom. NLRB v. Unbelievable, Inc.*, 71 F. 3d 1434 (9th Cir 1995), in support of its argument that Respondent “abrogated” the contract by denying the union agent access under the circumstances described above. I find that case to be inapposite, because the circumstances therein were much different. In *Frontier Hotel*, the employer not only denied access to several union agents, but permanently barred them from its premises, even though they had only engaged in contract-related conversations with bargaining unit members in non-work areas, an activity that was explicitly permitted under the terms of the access clause of their agreement. The language of the agreement in this case does not explicitly or clearly permit the type of access involved herein.

ers effectively. *Turtle Bay Resorts*, supra; *Frontier Hotel & Casino*, supra. Indeed, I note that this change, given Respondent's position and stance in this litigation, does not appear to be an isolated or one-time event, but represents a change in policy, having taken the position that union representatives were never allowed to post notices, a policy likely to be enforced in the future, unless barred. Moreover, this incident, in my view, cannot be considered in isolation. Instead, it must be viewed as a continuation—or reaffirmation—of a policy of repudiating past agreements or practices that started in 2010, when Respondent repudiated a collective-bargaining agreement it had reached with the Union, as found by the prior judge in 2011 and affirmed by the Board in its 2014 decision, cited above. Thus, it can be inferred that the current incident represents the further “tightening of the screws” in what can, in these circumstances, be reasonably viewed as Respondent's plan to distance its employees from their collective-bargaining representative. I conclude that it cannot be a complete coincidence that this incident occurred shortly after the Board had ordered Respondent to execute and abide by the terms of the agreement it had agreed to it 2010, and just minutes after the Union's agent, Koerner, had dropped off a copy of said agreement at the corporate office across the street from the plant for Respondent to sign. Accordingly, I conclude that by unilaterally changing the parties' past practice regarding the Union representative's access to post notices, Respondent violated Section 8(a)(5) and (1) of the Act.¹⁰

Finally, Respondent argues that to the extent that a unilateral change to past practice is the key to finding a violation of the Act in this matter, the General Counsel did not allege or plead such in its complaint, impliedly suggesting that such finding cannot be sustained because it would violate due process. It is true that the General Counsel in its complaint did not plead a unilateral change in past practice as the basis for finding a violation. Rather, the complaint cites the access clause, pleads the denial of access on January 27, alleges Respondent's denial of access is a mandatory subject of bargaining, and generically alleges that by engaging in such conduct Respondent failed to bargain collectively within the meaning of Section 8(d) and in violation of Section 8(a)(1) and (5) of the Act. (Complaint pars. 6 and 7.) Thus, unlike the situation in *Springfield Day Nursery*,

362 NLRB No. 30 (2015), or *Pepsi Bottling Group, Inc.*, 338 NLRB 1123 (2003), the General Counsel did not specifically plead or litigate a contract *modification* in violation of Section 8(d), only to change course in its brief to argue instead a unilateral change in violation of Section 8(a)(5) and (1). In *Springfield Day Nursery* and *Pepsi Bottling Group* the Board found such postlitigation change of theories improper and in violation of due process, because the theories of contract modification and unilateral change are different and may call for different defenses. In the present case, however, a unilateral change in violation of Section 8(a)(5) and (1) was alleged in the complaint, albeit not specifically mentioning past practice. Moreover, in his opening remarks, counsel for the General Counsel argued that Respondent had denied the Union access that it had routinely allowed previously, which implies past practice, stated that such unilateral change was material and significant, and that such conduct violated Section 8(a) (5) and (1) of the Act (Tr. 15–16). Just as importantly, Union Business Agent Koerner testified at length about the parties' past practice with regard to access, testimony that was addressed by Respondent's only witness, Brackney. Accordingly, Respondent was on notice about General Counsel's theories, even if they were evolving as the case progressed. Respondent had full opportunity to address the facts as presented by the General Counsel, and I conclude that this matter was fully litigated.

In these circumstances, I am permitted to find a violation on a different theory than explicitly plead by the General Counsel. *Hawaiian Dredging Construction Co.*, 362 NLRB No. 10, slip op at 2 fn. 6 (2015); *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 4 (2015). Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the parties' past practice with regard to access.

CONCLUSIONS OF LAW

1. Noel Canning, a Division of the Noel Corporation (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local 760 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By denying union representatives access to its plant to post a notice, Respondent unilaterally changed the terms and conditions of employment, and has been failing and refusing to bargain collectively and in good faith with the Union as the collective-bargaining representatives of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.

REMEDY

The appropriate remedy for the 8(a)(5) and (1) violation I have found is an order requiring Respondent to cease and desist from such conduct and to take certain affirmative action consistent with the purposes of the Act.

Specifically, having found that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to grant access to union representatives to post a notice in the plant, I shall recommend that Respondent be ordered to cease and desist from such conduct. Additionally, Respondent will be required to post a notice to employees assuring them that Respondent will not vio-

¹⁰ In light of the above, it is with no small amount of irony that I view some unsolicited remarks volunteered by Brackney during his testimony. He thus testified: “(M)ay I say something? . . . One of the biggest complaints that I have about—from the employees is they never see their Union rep. So that kind of says it right there” (Tr. 90). It should be noted that to the extent visits by union representatives to the plant may have diminished in the last few years, a large part of the blame must be laid at Respondent's feet. Because of Respondent's unfair labor practice in repudiating the 2010–2012 agreement, as found by the Board, the parties' collective-bargaining relationship has been in limbo, with everything “frozen in place” since 2010. This includes the lack of a grievance procedure, which is no longer in effect after the prior contract's expiration. Respondent is thus reaping the benefits of its unlawful conduct, and is now further restricting the Union's representatives' access. In these circumstances, Respondent should not now be heard to repeat employees' ostensible complaints about the lack of the Union's presence in the plant.

late their rights in this or any other related manner in the future. Finally, to the extent that Respondent communicates with its employees by email, it shall also be required to distribute the notice to employees in that manner, as well as any other electronic means it customarily uses to communicate with employees.

Accordingly, based on the forgoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, Noel Canning, a Division of the Noel Corporation, Yakima, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the past practice of granting access to union representatives for the purpose of posting notices in the plant.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Rescind the unilateral change in the parties' practice regarding access to the plant by union representatives to post union notices, and notify the Union in writing that this has been done.

(b) Within 14 days after service by the Region, post at all its facility in Yakima, Washington, where notices to employees are customarily posted, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 29, 2015.

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹² If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 28, 2016

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefits and protection

Choose not to engage in any of these protected activities.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT unilaterally, and without bargaining with Teamsters Local 760 (Union), change our practice of allowing union representatives access to the plant to post union notices.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL rescind the unilateral change in the parties' practice to allow union representatives access to the plant to post union notices, and notify the Union in writing that this has been done.

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-145344 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

